Bolton Finance Bhd v Kenneth James Sanker & Anor

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5-22-785-1990
KAMALANATHAN RATNAM JC
4 MAY 1996

Civil Procedure *— Summary judgment — Application for — Whether the correct sum was demanded by the plaintiff — Failure to specifically include a sum in the summons in chambers — Whether the said sum ought to be allowed under the prayer 'any other orders as the honourable court deems fit and proper' — Whether summary judgment ought to be granted — Whether there was any defence on the merits*

The plaintiff and borrower company ('the borrower') entered into a debenture agreement dated 13 July 1988 for a term loan of RM600,000. The defendants stood as guarantors for the loan. Pursuant to the debenture, the plaintiff appointed a receiver and manager for the borrower on 30 June 1989. The borrower defaulted in the payment of monthly interests and the plaintiff sued the defendants as guarantors for breach of the loan. The writ and statement of claim was later amended to include a claim for RM83,823.69 being the costs of appointing and running the borrower company under receivership. The plaintiff subsequently proceeded to take out a summary judgment application for the outstanding sum of RM634,168.64 as at 3 July 1990 together with interest at RM157.96 per day and for the sum of RM83,623.69 being fees for the receiver. Various other interlocutory applications were taken out by both the parties. The summary judgment application was finally heard by the learned senior assistant registrar on 19 December 1995. The application was dismissed. The plaintiff appealed to the High Court. The issues before the court was whether the plaintiff had demanded the correct sums and whether the defendants had a defence on the merits to the application.

Held, allowing the appeal:

It was clear that the plaintiff had demanded the correct sums. The statement of claim was amended to include the exact sums expended on the receiver and manager amounting to RM83,623.69. Although this sum was not specifically included as an item in the summons in chambers, this item ought to be allowed under the prayer 'for any other relief as the honourable court deems fit and proper' as it had been shown to have been expended. On the facts, it was also clear that there was no defence in this case (see p 16G).

[Bahasa Malaysia summary

Plaintif dan syarikat peminjam ('peminjam') telah mengikat suatu perjanjian debentur bertarikh 13 Julai 1988 untuk suatu pinjaman sebanyak RM600,000. Defendan-defendan adalah penggerenti-penggerenti bagi pinjaman itu. Mengikut debentur itu, plaintif telah melantik penerima dan pengurus bagi peminjam pada 30 Jun 1989. Peminjam telah ingkar dalam bayaran faedah bulanan dan plaintif menyaman defendan-defendan sebagai penggerenti-penggerenti kerana kemungkiran pinjaman itu. Writ dan pernyataan tuntutan

kemudiannya dipinda untuk memasukkan tuntutan sebanyak RM83,823.69 yang merupakan kos pelantikan dan pengurusan syarikat peminjam dalam penerimaan. Plaintif kemudiannya meneruskan untuk membuat permohonan untuk penghakiman terus bagi jumlah yang terhutang sebanyak RM634,168.64 setakat 3 Julai 1990 bersama dengan faedah pada RM157.96 sehari dan untuk jumlah RM83,623.69 yang merupakan yuran untuk penerima. Beberapa permohonan interlokutori lain diambil oleh kedua-dua pihak. Permohonan untuk penghakiman terus akhirnya didengar oleh penolong kanan pendaftar yang arif pada 19 Disember 1995. Permohonan tersebut ditolak. Plaintif membuat rayuan kepada Mahkamah Tinggi. Isu di hadapan mahkamah adalah sama ada plaintif telah menuntut jumlah yang betul dan sama ada defendan-defendan mempunyai pembelaan atas merit terhadap permohonan itu.

Diputuskan, membenarkan rayuan:

Adalah jelas bahawa plaintif telah menuntut jumlah yang betul. Pernyataan tuntutan telah dipinda untuk memasukkan jumlah yang tepat yang dibelanjakan untuk penerima dan pengurus berjumlah RM83,623.69. Walaupun jumlah ini tidak dimasukkan secara spesifik sebagai suatu butir dalam saman dalam kamar, butir ini patut dibenarkan di bawah tuntutan 'untuk apa-apa relief lain yang mahkamah yang mulia ini fikirkan patut dan wajar' kerana ia telah ditunjukkan telah dibelanjakan. Atas fakta-fakta, adalah juga jelas bahawa tiada pembelaan dalam kes ini (lihat ms 16G).]

Notes

For cases on the application for summary judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3238–3244.

Cases referred to

China & South Seas Bank Ltd v Tan [1989] 3 All ER 839 (refd)
United Malayan Banking Corp v Palm & Vegetable Oils (M) Sdn Bhd & Ors [1983] 1 MLJ 206 (refd)
United Prime Corp Bhd v Q-Built Construction (M) Sdn Bhd & Ors [1987] 1 CLJ 501 (refd)

Legislation referred to

Rules of the High Court 1980 O 14

Clement Thomas (*Len & Gledhill*) for the plaintiff.
Raymond Chia (student in chamber of *Eugene Tan*) (*Eugene Tan & Co*) for the defendants.

Kamalanathan Ratnam JC:

Background to this appeal

The plaintiff company sued the first and second defendants as guarantors. By a debenture dated 13 July 1988 ('the debenture') issued by Park East

Holdings (M) Sdn Bhd ('the borrower'), the plaintiff granted the borrower a term loan of RM600,000 ('the loan facility') together with interest at the rate of 2% pa above the plaintiff's base lending rate ('BLR') with monthly rests ('the prescribed rate') or at such other rate subject to variations by the plaintiff from time to time.

By a first guarantee agreement dated 29 August 1988 ('the first guarantee agreement') and by a second guarantee agreement dated 13 July 1988 ('the second guarantee agreement'), the first defendant and the second defendant respectively agreed and guaranteed to pay the plaintiff on demand as principal debtors all sums and money from time to time owing by the borrower to the plaintiff inclusive of interest.

On 30 June 1989, the plaintiff appointed a receiver and manager for the borrower pursuant to the debenture. Since the borrower had defaulted in payment of monthly interests, the plaintiff recalled the entire loan sum.

In its statement of claim against the first and second defendants, the plaintiff prayed for judgment of RM490,678.11 as at 17 July 1989, interest from 18 July 1989, costs and legal fees. The plaintiff then applied to amend the writ and statement of claim to include a claim for RM83,623.69 being the costs of appointing and running the borrower company under receivership. The outstanding sum was also amended to reflect a sum of RM634,168.64 as at 3 July 1990 together with interest at RM157.96 per day from 1 August 1990 till full settlement. A statement of account as at 31 July 1990 was also attached to the said amended writ and statement of claim.

The plaintiff took out an O 14 application (encl 13) against both defendants for the outstanding sum of RM634,168.64 and interest of RM157.96 per day and for the sum of RM83,623.69 being the fees for the receiver. In a supporting affidavit affirmed on 8 November 1990, the senior manager of the loan review and recovery department of the plaintiff averred the facts as narrated herein. A copy of the debenture was also annexed.

Pursuant to cl 4 of the debenture, the borrower agreed to repay the plaintiff on demand the loan facility of RM600,000 together with interest at the prescribed rate or at such other rate subject to variation by the plaintiff from time to time.

Until demand as aforesaid, the borrower was to repay the loan facility within three years from the date of first release of the loan in the following manner:

(1) the principal sum of RM300,000 by way of redemption as disbursement on end finance to members of the borrower within a year; and

(2) the balance principal sum of RM300,000 by four equal half annual instalments of RM75,000 each, the first instalment to commence on the 18th month from the date of the first drawdown.

It was also a term of the debenture that the borrower should pay the plaintiff additional interest at the rate of 1% above the prescribed rate if the borrower defaulted in the payment on the due date of any one or more of the instalments. The letters of guarantee executed by both defendants were also annexed. It was also a term of the guarantee that the conclusive

evidence clause would apply. The full sum of RM600,000 was released to the borrower. A further sum of RM5,000 was expended as deposit for security in defending a distress suit filed against the borrower.

In reply to the plaintiff's affidavit in support of the O 14 application, the second defendant affirmed an affidavit (encl 14) both on his behalf and as attorney for the first defendant. The second defendant denied the debt and the term loan and further denied that the loan was granted at both the defendants' request. In any event, the defendants attempted to explain that since the principal sum of RM300,000 related to the end-financing to members of the borrower, any liability arising from the above principal sum would be that of the members of the borrower and consequently the borrower could not be held liable. The second defendant also annexed a copy of the summons filed by the plaintiff against a borrower in the magistrate's court. It was thus contended that this suit constituted a duplicity or multiplicity of suits which could not be maintained in law. It was further contended that the date of first drawdown was 14 July 1988 and since the receiver and manager were appointed on 29 June 1989, clearly there was only a lapse of 11 months from the date of first drawdown and thus the instalments to be paid by the borrower had not become due and were therefore not payable. The affidavit further alleged that there was no proper demand made to the borrower recalling the facility and it was also contended that there was no default for a receiver and manager to have been appointed. It was further argued that the plaintiff ought to first clearly prove its case against the borrower before it was entitled to invoke the liability of the guarantors and since the borrower was not liable to the plaintiff for the sum alleged to be owing in the first place, accordingly the guarantor's liability could not be sought. The defendants further contended that the distress suit was subsequently set aside and that therefore there was no basis for the appointment of the receiver and manager. They also challenged the appointment of the receiver and manager under the hand of Dato' Chong Shi Guan, whom the plaintiff held out to be their executive director and holder of the power of attorney.

In reply to encl 14, the plaintiff replied through the same senior manager (encl 16) annexing a copy of the first defendant's consent to act as guarantor dated 16 August 1988. The plaintiff denied that the sum of RM300,000 related to the end-financing to members of the borrower and that the defendants vide encl 14 had actually referred to another facility, ie the end-financing of RM2m granted to the members of the borrower which had nothing to do with this facility. They contended that the entire term loan was used for the benefit of the borrower, that is, RM300,000 as working capital of the borrower and the balance of RM300,000 was for the borrower's acquisition of assets.

In respect of the contention that the period of time was only 11 months between the first drawdown date and the appointment of the receiver and manager, the plaintiff replied that the schedule of payment was subject to demand. Since there was a default by the borrower, the entire facility was demanded by the plaintiff even though the principal repayment was not due then. The plaintiff further contended that the demand and the subsequent crystallization of the floating charge was necessary to protect

A the interest of the plaintiff as well as the borrower with regard to the distress suit commenced by UDA.

With regard to the defendant's contention that no proper demand was made on the borrower, the plaintiff annexed copies of the demand dated 23 March 1989 and 18 April 1989 respectively with the AR cards B duly acknowledged by the borrower.

As to the setting aside of the distress suit and that this defeated the reason for the appointment of the receiver and manager, the plaintiff contended that the setting aside of the distress suit did not affect the legality of the appointment of the receiver and manager and that the C distress suit was not the only ground upon which the receiver and manager were appointed. With regard to the challenge on the right of Dato' Chong Shi Guan to appoint the receiver and manager, the plaintiff annexed the copy of the power of attorney dated 2 December 1988 endorsing the appointment of Dato' Chong as the donee of the power of attorney. Since the defendant's liability arose upon demand, it was averred that the D defendant's contention that the plaintiff ought to first prove their case against the borrower was untenable. It was thus argued that there were no triable issues. The plaintiff filed a further affidavit through this same deponent (encl 17) annexing the receipt for the sum of RM83,623.69 being the cost of appointing the receiver and manager to run the borrower and the plaintiff contended that there was no defence to this action.

E

One Goh Mey Foon, an advocate and solicitor of the plaintiff, affirmed an affidavit (encl 19) wherein, inter alia, the reason for the delay in the filing of the O 14 application was given. The reason was that on discovering that the amount paid to the receiver and manager was not included in the statement of claim, the plaintiff filed an application on F 5 September 1990 to amend the statement of claim to include the sum of RM83,623.69 paid to the receiver and manager and obtained an order of court to this effect on 8 October 1990. Thus, it was because of this that the O 14 application was filed only on 8 November 1990, by which time the defence had already been filed.

G A further affidavit was filed by the second defendant, wherein he exhibited an advertisement by the receiver and manager of the borrower for the sale of the borrower's assets and contended that this was wrong in law as the plaintiff could not proceed with this suit and at the same time take steps to realize the assets of the borrower and that this amounted to a double recovery and unjust enrichment. He exhibited a letter dated H 9 April 1991 from the receiver and manager inviting him to tender and also disclosing the tenders already received. He then replied saying that he had managed to get a purchaser for RM18,000 and enclosed a cashier's order for 10% of the said sum. He was subsequently informed that he was unsuccessful although he believed he was the highest tenderer; he was later I informed that the final bid was RM20,000 which he believed again arose out of negotiations between the receiver and manager and the tenderer.

He further contended that a company called Shenri (M) Sdn Bhd had offered to purchase the assets in question at a total purchase price of RM500,000 and that the plaintiff had rejected the said offer. In the circumstances, it was his contention that he had raised a triable issue by

showing the disparity between RM20,000 and RM500,000. His own liability as a guarantor would therefore have been substantially reduced if the offer of RM500,000 had been accepted. He was of the view that the assets were actually worth RM1m since the loan itself was for RM600,000 and it was the usual practice to offer as a loan about 60% of the security offered. A

The same deponent filed an application for stay of all proceedings until further order (encl 23) and supported the same by an affidavit (encl 22) wherein he stated that he believed that the assets of the borrower had been fully disposed of and that he had not been kept appraised of the facts as ought to have been done since he was the guarantor. The application was necessary, he said, as the plaintiff had not to date informed this court of the various steps they had taken to realize the assets in question. B C

The learned senior assistant registrar ('the SAR') who heard this application granted order in terms of encl 23 on 4 June 1991 and the plaintiff appealed to the judge in chambers. Abu Mansor J (as he then was) allowed the plaintiff's appeal with costs and rejected the defendants' request for further arguments in open court. D

Consequently, the O 14 application was refixed for hearing before the SAR on 7 November 1991. In the meantime, the second defendant filed another affidavit (encl 32) both on his own behalf and as attorney for the first defendant whereby he challenged the late filing of the O 14 application and contended that both defendants had been prejudiced by the delay. E

The SAR who heard the O 14 application on 7 November 1991 dismissed the same upon hearing the preliminary objection by the defendants regarding the late filing of the O 14 application. An appeal was filed before the judge in chambers against this decision. F

In reply to encl 21 that the receiver and manager ought not to realize the assets of the borrower and at the same time proceed with this suit, the plaintiff replied through the same senior manager in encl 34 stating that for all intents and purposes the receiver and manager was the agent of the borrower and that the plaintiff was in no way involved in any action taken by the receiver and manager. He contended that the plaintiff had the right in law to proceed with this suit and to appoint the receiver and manager. In reply to the allegation that there was a company called Shenri (M) Sdn Bhd that had offered to purchase the assets of the borrower for RM500,000, the plaintiff replied that the letter (exh S-7) in encl 21 ought to have been addressed to the receiver and manager — and not to the plaintiff — as by then the receiver and manager had already been appointed. In any event, it was contended that the offer to purchase as stated in exh S-7 was conditional and the agreeing of these conditions were beyond the scope and contract of the plaintiff. G H

In the meantime, the said O 14 application was again fixed for hearing on 5 August 1992. On that date, the defendants' solicitors failed to attend and judgment was given for the plaintiff after submission was made by the plaintiff's counsel. However, the defendants applied to set aside the judgment (encl 48) and contended that it was a judgment in default. In the second defendant's affidavit (encl 47) in support of his I

A application to set aside the judgment in default, he averred that he did not see the notice of hearing sent by the court. He only knew of the date when he received the draft order. He contended that there were merits in the defence.

In response to encl 47, one Sharil bin Lin — the solicitor having conduct of this case on behalf of the plaintiff — affirmed an affidavit B (encl 60) wherein he referred to the second defendant's admission that he had failed to see the notice of the court informing the defendants of the hearing of the O 14 application on 5 August 1992.

On 14 January 1993, when the application to set aside the judgment came up for hearing, the plaintiff took a preliminary objection which was C that the judgment dated 5 August 1992 was not a judgment in default but a judgment on merits given after hearing arguments and as such the principle of res judicata applied. The preliminary objection was overruled by the SAR and the plaintiff appealed to the learned judge in chambers (encl 64).

In the meantime, encl 48 came up for hearing before the SAR on D 17 May 1994 and after having reserved judgment, the SAR on 6 June 1994 set aside the judgment. The hearing of the O 14 application (encl 13) was fixed before the learned judge on 19 September 1994. After numerous adjournments, encl 13 — which was finally fixed for hearing on 17 May 1994 before the SAR — was struck out in the absence of both parties. The E plaintiff then applied to reinstate the said summons and averred that the solicitors did not receive the court's notice informing them of the hearing date and contended that since even the defendants' solicitors had failed to attend, it must be that both solicitors had not received the said notice and that only upon the plaintiff's solicitors making a search in the court file did they discover a copy of the notice that was sent to both parties.

F In his reply to the said affidavit, the second defendant took umbrage at the fact that the application to set aside was filed outside the 14-day period provided by the Rules of the High Court 1980 to set aside an order. The SAR who heard arguments on this application on 28 September 1995 allowed the reinstatement of encl 13 and fixed it for hearing on 6 November G 1995. On the said date, the SAR sought clarification from the plaintiff on whether the proceeds of sale pursuant to the debenture had been taken into account by the plaintiff. The plaintiff affirmed an affidavit (encl 80) confirming that a sum of RM20,688 had been taken into account by the receiver and manager. It further averred that the full sum of RM600,000 had been released to the borrower. In his reply, the second defendant vide H encl 81 challenged the sale as to whether it was by tender.

The SAR, having heard submissions, dismissed encl 13 on 19 December 1995. Hence this appeal before me.

The appeal against the dismissal of the O 14 application

I If it is to be said that the road to justice is a tedious and tortuous one, then this case is a living embodiment that bears testimony to that expression. The trail taken by a simple O 14 application literally lost itself in the maze of litigation. Had this matter been fixed for trial proper, in all probabilities within these six years, this case could have even cleared the various appellate courts and been put to an end. Little wonder that litigants

lament the delay in obtaining justice. On the hearing of this appeal before me, Mr Clement Lopez appeared for the appellant/plaintiff. The respondents/defendants were not represented. I was assured by counsel that he not only had served encl 82 — ie the notice of appeal on the solicitors on record for the defendants — but had also served the same on leading counsel who had acted for the firm of solicitors. I then stood down the matter and requested Mr Lopez to telephone the defendants' solicitors' office and enquire why no one was present lest this case again take a further route if I were to hear the appeal ex parte. Mr Raymond Chia, a student in the chambers of Mr Eugene Tan, appeared with apologies and confirmed his intention to proceed with the matter after his request for an adjournment was turned down.

Mr Lopez referred me to encl 13A exh BFB-2 and 3, being the guarantee agreements signed by both defendants and in particular to s 3.05 in respect of both agreements, which reads as follows:

> For the consideration aforesaid and as a separate and independent stipulation:
>
> (a) The said Guarantor(s) hereby agrees that all sums of moneys which may not be recoverable from the Borrower(s) on the footing of a guarantee whether by reason of any legal limitation disability or incapacity on or of the Borrower(s) or any other fact or circumstances, whether known to Lender or not shall nevertheless be recoverable from the Guarantor(s) on demand as though the Guarantor(s) was the sole and principal debtor;
>
> (b) The said Guarantor(s) hereby irrevocably and unconditionally undertakes to indemnify the Lender in full and keep the Lender fully indemnified against all loss damage liabilities costs and expenses whatsoever which the Lender may sustain or incur as a result of or arising from your loans advances credit or other facilities granted to the Borrower(s).

He then referred me to encl 11, being the amended statement of claim showing the exact figures claimed. I was also referred to encl 80 exh CTH-2 showing the plaintiff's statement of accounts as at June 1989 reflecting a balance due amounting to RM478,954.73 from the borrower. With regard to the calculation of the interest, the plaintiff argued that notwithstanding the fact that they were entitled to compound interest, they were in fact claiming simple interest being the prescribed interest at the rate of 10.75% plus 1% overdue interest on the balance outstanding as at 17 July 1989, ie RM490,678.11. The formula for arriving at RM157.96 interest per day was as follows:

$$RM490,678.11 \times 11.75\% / 365 = RM157.96$$

With regard to the sum of RM83,623.69 expended towards the receiver and manager, I was referred to encl 17 exh A — which was a letter from the receiver and manager confirming receipt of the said sum from the plaintiff. The plaintiff had further expended a sum of RM5,000 as security for costs to exercise their right under the debenture by seeking distress action. The receipt for the RM5,000 paid to the solicitors was exhibited as exh BFB-5 to encl 13A. Finally, a statement exh BFB-8 annexed to encl 13A was addressed to both the defendants, clearly showing the breakdown of the sum of RM634,168.64.

A In reply, Mr Raymond Chia submitted that encl 80 did not truly reflect what the SAR had directed and instead referred me to encl 81 which was the second defendant's affidavit whereby it was alleged that the SAR had directed an enquiry:

(1) to ascertain if the sale of the borrower's assets was by tender, and

B (2) if so, whether the proceeds of sale had been taken into account when the plaintiff filed his amended statement of claim and annexed a statement of account as at 31 July 1990 showing a balance of RM634,168.64.

C Mr Lopez referred me to encl 80, which showed that the movable properties were sold for RM35,367. Mr Chia then submitted that according to encl 80 para 3, a sum of RM20,688 was allegedly taken into account and not RM35,367 as alleged by Mr Lopez. He then submitted that finally he was relying on encl 14 para 40 which raised numerous issues.

D I have checked the SAR's notes as entered by him on 6 November 1995 with regard to the diverse contentions of both parties as to the SAR's directions given on 6 November 1995 to the plaintiff and I reproduce herewith his directions:

Mahkamah:	Mengarahkan plaintif failkan affidavit tambahan untuk jelaskan perkara mengenai RM20,000 yang dikatakan
E	sebagai nilai pelupusan.
En Eugene Tan:	Saya bantah perintah ini kerana ini bermakna memberi peluang kedua kepada plaintif untuk memperbaiki kesnya.
F Mahkamah:	Bantahan ditolak.

In respect of the various issues raised in para 40 of encl 14, all these had been raised and replied in the various affidavits supported by exhibits. With regard to the question as to whether the proceeds of sale of the borrower's assets had been taken into account, I need to refer only to G encl 80 and to the exhibits annexed thereto which show the statement of account as at 31 May 1991, whereas the annexure to the amended statement of claim (encl 11) was as at 31 July 1990. As the sale of the borrower's assets only took place in 1991, the plaintiff would not be able to reflect the sale of the assets into the statement of account as at 31 July 1990.

H The same exhibits show that there is still a balance of RM116,516 due and owing to the receiver and manager and whether the assets were realized for RM20,688 or RM35,367, both these figures fell far short of satisfying even the receiver and manager's own expenses. If at all there is to be a claim by the guarantors in respect of any excess (if available upon the sale of the borrower's assets), then a proper claim ought to be made to I the receiver and manager. The respondents referred me to *United Prime Corp Bhd v Q-Built Construction (M) Sdn Bhd & Ors* [1987] 1 CLJ 501. In that case, Zakaria Yatim J (as he then was) held that in order to give the contract of guarantee business efficacy, the letter of demand must state most clearly what the guarantors were required to pay. He held that the amount stated in the letter of demand and in the statement of claim were

inconsistent with what was proved in the lease agreement. He thus held that the SAR was wrong in granting the O 14 judgment and thus set it aside. I am of the view that this case in fact favours the appellants. A letter of demand (exh BFB-8) annexed to encl 13A was sent to each of the defendants for the sum of RM634,168.64 and for continuing interest. This is the same figure pleaded in the amended statement of claim (encl 11).

I was also referred to *United Malayan Banking Corp Bhd v Palm & Vegetable Oils (M) Sdn Bhd & Ors* [1983] 1 MLJ 206, wherein Raja Azlan Shah Ag LP (as His Highness then was) held that since the proceeds of a series of sales of shares were not credited in the statement of accounts as at 31 December 1980 — although all the shares had been disposed of in September 1980 — this required proper investigation and cross-examination and accordingly justified a trial and not a summary judgment. But this case will not help the respondent. Whatever was obtained from the proceeds of sale in the case before me was insufficient to even satisfy the receiver and manager's own expenses. In *China & South Sea Bank Ltd v Tan* [1989] 3 All ER 839 (PC), the Privy Council held that since the rights of a surety continue to depend on the principles of equity, it followed that unless the security was surrendered, lost, rendered imperfect or altered in condition by reason of what had keen done by the creditor, the surety remained liable under his contract to pay the creditor if the debtor failed to do so, and the creditor was entitled to sue him instead of pursuing his claim against the debtor or selling the mortgaged securities. The law relating to the creditor's unfettered rights to enforce was succinctly put by Lord Templeman at p 842:

> In the present case, the security was neither surrendered nor lost nor imperfect nor altered in condition by reason of what was done by the creditor. The creditor had three sources of repayment. The creditor could sue the debtor, sell the mortgage securities or sue the surety. All these remedies could be exercised at any time or times simultaneously or contemporaneously or successively or not at all.

The plaintiff/appellant has clearly demanded the correct sums. The statement of claim was amended to include the exact sums expended on the receiver and manager amounting to RM83,623.69. Although this sum was not specifically included as an item in the summons in chambers, I hold that this item ought to be allowed as it has been shown to have been expended. This item ought to be allowed under prayer (c) which prays for any other relief as the honorable court deems fit and proper. I am of the view that there is no defence in this case.

I therefore allowed the appeal and set aside the order of the SAR dated 19 December 1995. I gave judgment for the plaintiff:

(1) for the sum of RM634,168.64 as at 31 July 1990 together with interest at RM157.96 per day from 1 August 1990 to date of full settlement;

(2) for the sum of RM83,623.69 with no interest; and

(3) cost of this appeal.

Appeal allowed.

Reported by Lew Chee Seong